

- (1) Under K.S.A. 44-534a, the Appeals Board has the authority and jurisdiction to review preliminary hearing findings related to the issues of whether an individual has sustained personal injury by accident arising out of and in the course of their employment and whether the individual has given their employer timely notice of accident as required by K.S.A. 44-520.
- (2) The Preliminary Hearing Order of the Administrative Law Judge should be affirmed. Claimant sustained injury to his right elbow while working for the respondent on or about

February 9, 1995. At the time of the accident, claimant was lifting a five (5) gallon can of waste solvent and felt a "pop" in his elbow and pain radiating upward into the shoulder. Claimant reported the incident to respondent and was referred to the company physician, Sergio Delgado, M.D.

Claimant first saw Dr. Delgado on February 22, 1995 and reported pain in his right elbow and upper arm. Although claimant believes he told the doctor he had pain in his shoulder, Dr. Delgado's office notes and letter of June 1, 1995, indicate claimant did not. However, the doctor does write in his letter that claimant's right shoulder problem developed over the course of treatment. Another medical form, dated June 6, 1995 and signed by the doctor, indicates claimant needs shoulder surgery and relates the shoulder injury to claimant's employment as a result of carrying heavy items at work.

Based upon these medical records, coupled with claimant's testimony that his shoulder worsened between the dates of February 9 and his last day of work on March 29, 1995, the Appeals Board finds that claimant has proven for preliminary hearing purposes that he sustained a right shoulder injury by reason of an accident that arose out of and in the course of his employment with the respondent.

(3) Claimant provided timely notice of accidental injury as required by K.S.A. 44-520. Claimant notified respondent of the incident of February 9, 1995, when he experienced pain in his elbow and right arm. For purposes of preliminary hearing, the Appeals Board finds the date of accident for claimant's shoulder injury is his last day of work on March 29, 1995. This finding is based upon claimant's testimony that he continued working for respondent after he saw Dr. Delgado on February 22 and, despite his restriction to light duty, performed his regular duties that required heavy lifting and the handling of heavy items. As claimant testified, respondent initially honored the light duty restriction and provided co-workers to help claimant lift and handle the heavier items. However, after several days, the co-workers stopped helping claimant and left him to perform his duties without assistance. During this period, the symptoms in claimant's right shoulder worsened which prompted Dr. Delgado to take him off work. Claimant was taken off work on March 29, 1995 and delivered the off-work slip to respondent and advised the company at that time that he could not work as he needed treatment for both the elbow and shoulder injuries.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order of Administrative Law Judge James R. Ward entered in this proceeding on July 28, 1995, should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: John M. Ostrowski, Topeka, Kansas
 Matthew W. Tills, Kansas City, Missouri
 James R. Ward, Administrative Law Judge
 Philip S. Harness, Director